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Desa Cargill Sdn Bhd v Lo Soo Jung & Anor

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HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NCvC-65/6 OF 2016 (HC1)
MAIRIN IDANG JC
15 FEBRUARY 2018

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Civil Procedure — Setting aside — Judgment in default — Second defendant in original action obtained judgment in default of defence ('JID') against first defendant in original action — Plaintiff in original action applied to set aside JID — Whether application filed out of time — Whether JID should be set aside ex debito justitiae — Rules of Court 2012 O 3 r 5, O 19 rr 2, 7 & O 42 r 13

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On 25 September 2017, the second defendant in the original action ('the D2OA') obtained the judgment in default of defence ('the JID') in respect of the amended counterclaim against the first defendant in the original action ('the D1OA'). The JID was made under O 19 r 2 of the Rules of Court 2012 ('the ROC'). On 24 November 2017, the plaintiff in the original action ('the POA') filed the present application to set aside the JID ('encl 93'). D2OA submitted that three months had lapsed when the application was made. There was also an issue on the filing of encl 93 by the POA instead of D1OA.

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Held, allowing encl 93 with costs in the cause:

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(1) It was trite that when a judgment was obtained, the same must be served on the defendant. This was to enable the defendant to apply to set aside the JID within 30 days of receiving the same (O 42 r 13 of the ROC). Under this rule, time did not run until the said judgment had been proved properly served on the defendant. In the present case, the POA had filed its application to set aside the JID on 24 November 2017 within 21 days of knowing the existence of the JID. In any event POA had also applied for extension of time to file the present application pursuant to O 3 r 5 of the ROC. The court under the inherent jurisdiction to prevent abuse of proceedings also had power to set aside the JID despite the application being out of time if the circumstances of the case require the intervention of the court (see para 3).

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(2) The D2OA's claims in the amended counterclaim were in the main for declaration, general, aggravated and exemplary damages. It had been held that where a case involved declaratory relief a JID would not be allowed unless supported by evidence and for court to consider before discretion was exercised. In the present case, O 19 r 2 of the ROC could not be resorted to because it dealt with a claim for a liquidated demand. The

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proper and correct rule should be O 19 r 7(1) and (3) of the ROC but the plaintiff was required to apply to the court to get judgment by notice of application. In not doing so, D2OA had contravened O 19 r 7 of the ROC which would entitle POA to have the JID set aside, ex debito justitiae (see para 5).

(3) There should not be any issue of POA applying to set aside the JID, more so when he was also a party in the amended counterclaim and the JID was injurious and prejudicial to him (see para 6).

[Bahasa Malaysia summary

Pada 25 September 2017, defendan kedua dalam tindakan asal ('D2OA') memperoleh penghakiman ingkar untuk pembelaan ('PI') berkaitan tuntutan balas yang dipinda terhadap defendan pertama dalam tindakan asal ('D1OA'). PI itu telah dibuat di bawah A 19 k 2 Kaedah-Kaedah Mahkamah 2012 ('KM'). Pada 24 November 2017, plaintif dalam tindakan asal ('PTA') telah memfailkan permohonan ini untuk mengetepikan PI ('lampiran 93'). D2OA berhujah bahawa tiga bulan telah luput apabila permohonan itu dibuat. Ia juga merupakan isu berhubung pemfailan lampiran 93 oleh PTA dan bukan D1OA.

Diputuskan, membenarkan lampiran 93 dengan kos dalam kausa:

(1) Adalah penting apabila penghakiman diperolehi, perkara yang sama mesti disampaikan kepada defendan. Ini adalah untuk membolehkan defendan memohon untuk mengetepikan PI dalam masa 30 hari setelah menerima yang sama (A 42 k 13 KM). Di bawah kaedah ini, masa tidak bermula sehingga penghakiman tersebut telah dibuktikan dengan betul disampaikan kepada defendan. Dalam kes ini, PTA telah memfailkan permohonannya untuk mengetepikan PI pada 24 November 2017 dalam masa 21 hari setelah mengetahui kewujudan PI itu. Dalam apa keadaan, PTA juga telah memohon untuk lanjutan masa untuk memfailkan permohonan semasa menurut A 3 k 5 KM. Mahkamah di bawah bidang kuasa yang sedia ada untuk mengelakkan penyalahgunaan prosiding juga mempunyai kuasa untuk mengetepikan PI itu walaupun permohonan itu berada luar masa jika keadaan kes memerlukan campur tangan mahkamah (lihat perenggan 3).

(2) Tuntutan D2OA dalam tuntutan balas yang dipinda adalah utama untuk deklarasi, ganti rugi am, teruk dan teladan. Ia telah diputuskan bahawa di mana suatu kes melibatkan relief deklarasi suatu PI tidak akan dibenarkan melainkan disokong dengan keterangan dan untuk dipertimbangkan oleh mahkamah sebelum budi bicara dilaksanakan. Dalam kes ini, A 19 k 2 KM tidak dapat digunakan kerana ia mengenai tuntutan untuk tuntutan jumlah tertentu. Kaedah yang wajar dan betul adalah A 19 k 7(1) dan (3) KM tetapi plaintif dikehendaki memohon

kepada mahkamah untuk mendapatkan penghakiman melalui notis permohonan. Jika tidak berbuat demikian, D2OA telah melanggar A 19 k 7 KM yang akan memberi hak kepada PTA untuk mengetepikan PI itu, ex debito justitiae (lihat perenggan 5).

(3) Tidak patut ada isu tentang PTA memohon untuk mengetepikan PI, lebih lagi jika dia juga merupakan pihak dalam tuntutan balas yang dipindan dan PI itu adalah memudaratkan dan prejudis terhadap dirinya (lihat perenggan 6).]

Notes

For cases on judgment in default, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8798–8804.

Cases referred to

Amalan Tepat Sdn Bhd v Panflex Sdn Bhd [2012] 2 MLJ 168, FC (refd)
Chong Kueng Ying & Ors v Lovis Lavagna [1971] 2 MLJ 225 (refd)
Fira Development Sdn Bhd v Goidwin Sdn Bhd [1989] 1 MLJ 40, SC (refd)
Leonghan v Kupusamy [1959] 1 MLJ 95 (refd)
Syarikat Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129, SC (refd)
Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors [1998] 5 MLJ 108, HC (refd)
The South British Insurance Co Ltd v Haji Ismail Sin Kek Yeow, Intervener [1964] 1 MLJ 16 (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)
Windsor v Chalcraft [1938] 2 All ER 751, CA (refd)
Witech Sdn Bhd & Ors v BHR Group Ltd [2011] 1 MLJ 781, CA (refd)

Legislation referred to

Rules of Court 2012 O 15 r 3(2), O 19 rr 2, 7, 7(1), (3), 9, O 42 r 13

Chin Yuen Fong (Chee & Co) for the plaintiff.
Liew Chun Yean (Serena Liew & Assoc) for the second defendant.

Mairin Idang JC:

[1] It is unfortunate that the second defendant in the original action ('D2OA') has not complied with O 15 r 3(2) of the Rules of Court ('the ROC') when filing his counterclaim. This has created some confusion in addressing the parties. The practice is for this to be done as follows:

Between

AB ... Plaintiff

And

CD ... 1st Defendant

EF		... 2nd Defendant
	(by original action)	
	And Between	
EF		... Plaintiff
	And	
1. AB		... 1st Defendant
2. CD		... 2nd Defendant
	(by counterclaim)	

[2] In the amended counterclaim, D2OA claimed against both the plaintiff in original action ('POA') and the first defendant in original action ('D1OA') for the following orders:

(a) a declaration that the guarantee and indemnity agreement dated 21 April 2009 is null and void and no legal effect;

(b) further and in the alternative, a declaration that the guarantee and indemnity agreement dated 21 April 2009 is null and void and of no legal effect for uncertainty;

(c) a declaration that the guarantee and indemnity agreement dated 21 April 2009 was entered by the second defendant based on the misrepresentation of the plaintiff's agent or servant or representative and/or the first defendant;

(d) a declaration that the guarantee and indemnity agreement dated 21 April 2009 was produced by the first defendant by coercion and/or undue influence over the second defendant;

(e) general, aggravated and exemplary damages to be paid by the plaintiff and/or the first defendant to the second defendant for the misrepresentation;

(f) general, aggravated and exemplary damages to be paid by the plaintiff and/or the first defendant to the second defendant for the coercion and/or undue influence;

(g) interest thereon at the rate of 5%pa from the date hereof to the date of full realisation;

(h) costs on a full indemnity basis; and

(i) such further or other reliefs that this honourable court may deem fit and just.

[3] Let us start with this application (encl 93) to set aside the judgment in default of defence ('JID'), whether it is made within time. On 25 September 2017 (encl 89) D2OA obtained the JID in respect of the amended

counterclaim against D1OA. On the 24 November 2017, POA filed its application to set aside the JID (encl 93). D2OA said, three months had lapsed when the application was made. Now it is trite law when a judgment is obtained, the same must be served on the defendant. This is to enable the defendant to apply to set aside the JID within 30 days of receiving the same (O 42 r 13 of the ROC). I am of the view under this rule, time does not run until the said judgment has been proved properly served on the defendant. There is some issue on whether this JID was served on the POA or whether it needed to be served on POA or at all, as the JID was not obtained against POA but against D1OA. POA submitted that it was incumbent upon the D2OA to serve the JID on the POA as the JID had serious implication on POA. D2OA submitted the JID was made available for the parties in the Sabah Law Court's CMS since the date of filing of the same on the 25 September 2017 as such POA was out of time of at least three months of filing this application. POA submitted it came to know of the JID only upon being served with D2OA's application to strike (encl 90) on 3 November 2017. I am of the view POA had filed its application to set aside the JID on 24 November 2017 within 21 days of knowing the existence of the JID. In any event POA has also applied for extension of time to file this application pursuant to O 3 r 5. The court under the inherent jurisdiction to prevent abuse of proceedings also has power to set aside the JID despite the application being out of time if the particular circumstances of the case require the intervention of the court (see *Fira Development Sdn Bhd v Goidwin Sdn Bhd* [1989] 1 MLJ 40 (SC)).

[4] The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, as of right irrespective of the merits and without terms (see *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241 (FC)). The JID herein was made under O 19 r 2 of the ROC, it refers to a judgment in default of defence, where the claim is for a liquidated demand. It is my view that the plaintiff under this rule may enter a final judgment against a defendant who is in default of serving his defence for the amount claimed without application to or leave of the court.

[5] POA's claims in the amended counterclaim are in the main for declaration, general, aggravated and exemplary damages. It has been held that where a case involved declaratory relief a JID would not be allowed unless supported by evidence and for court to consider before it exercises its discretion (see *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168). I am of the view O 19 r 2 cannot be resorted to because the latter deals with a claim for a liquidated demand. I agree with POA that the proper and correct rule should be O 19 r 7(1) and (3) (other claims) but the plaintiff is required to apply to the court to get judgment by notice of application. In not doing so, D2OA had

A contravened O 19 r 7 which would entitle POA to have the JID set aside, *ex debito justitiae* (see *Witech Sdn Bhd & Ors v BHR Group Ltd* [2011] 1 MLJ 781 (CA) and *Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129 (SC)). It has also been held that O 19 r 9 gave the court a completely unfettered discretion to set aside a judgment in default (see *Leonghan v Kupusamy* [1959] B 1 MLJ 95 (HC) and *The South British Insurance Co Ltd v Haji Ismail Sin Kek Yeow, Intervener* [1964] 1 MLJ 16 (HC)).

[6] But it is POA who had applied to set aside the JID entered against D1OA. Ordinarily it should be the defendant who should do so where the C judgment was entered against him. The court in fact has the power to set aside an irregular judgment and is exercisable at the instance of any party injuriously affected by it (see *Windsor v Chalcraft* [1938] 2 All ER 751 which was followed in *The South British Insurance Co Ltd v Haji Ismail Sin Kek Yeow, Intervener* [1964] 1 MLJ 16 (HC)). Even a stranger to the action aggrieved by the D judgment may apply to set aside the same (see *Chong Kueng Ying & Ors v Lovis Lavagna* [1971] 2 MLJ 225 followed in *Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors* [1998] 5 MLJ 108). I am of the view there should not be any issue on POA applying to set aside the JID, more so when he is also a party in the amended counterclaim and the JID is injurious and prejudicial to him.

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[7] Thus after analysing the facts and having considered the law I find that the JID was an irregular JID. D2OA should have applied by notice of application to enter judgment which would require him to serve such application on the POA and D1OA. In the exercise of my discretion I also F allow the application for extension of time to file the application to set aside the JID. Enclosure 93 is allowed with costs in the cause.

Enclosure 93 allowed with costs in cause.

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Reported by Dzulqarnain Ab Fatar

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